NO. 92-1717

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BROWN & ROOT, INC.,
Petitioner,

versus

STEPHEN A. MISTICH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA STATE COURT OF APPEAL,
FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a punitive damage award was proper under the general maritime law for willful and wanton misconduct of a defendant.

LIST OF PARTIES

Respondents herein, Brandon L. Mistich, Rebecca Mistich Terrase and Shawn Mistich, are the children of original plaintiff, Stephen A. Mistich. Respondents were substituted in this litigation on January 5, 1990 subsequent to the death of their father.

Petitioner herein is Brown & Root, Inc., as identified in the Rule 29.1 Statement of its Petition for a Writ of Certiorari.

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DECISIONS BELOW

1. Judgment in favor of original plaintiff, Stephen A. Mistich, in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, dated April 28, 1989.

2. Decision of the Louisiana Court of Appeal, Fourth Circuit, amending and affirming the judgment in favor of plaintiff, dated November 17, 1992.

3. Order of the Supreme Court of the State of Louisiana denying a writ of certiorari filed by Brown & Root, Inc., dated March 12, 1993.

STATEMENT OF THE CASE

In June 1976, twenty-three year-old Stephen A. Mistich went to work offshore as a pipe welder for Brown & Root, Inc. on its pipelaying barges. In 1986, he was diagnosed with chronic myelogenous leukemia which was subsequently determined to be a result of his continuous exposure to hazardous levels of gamma radiation from x-ray cameras utilized by Brown & Root in its pipelaying process. In December 1986, Stephen A. Mistich filed suit against Brown & Root, and other former employers, for his injuries. He asserted a claim for negligence pursuant to the Jones Act, 46 U.S.C. §688, a general maritime law claim for unseaworthiness, and a general maritime law claim for the willful and wanton misconduct of Brown & Root.

On April 28, 1989, the Twenty-fifth Judicial District Court for the Parish of Plaquemines in the State of Louisiana found Brown & Root negligent, its vessels unseaworthy, and its conduct willful and in total disregard of plaintiff's rights. The trial court awarded Stephen A. Mistich compensatory damages for negligence and unseaworthiness in the amount of $3,147,608.00 and punitive damages in the amount of $4,000,000.00. The punitive damages against Brown & Root were awarded by the court in an "attempt to get the defendant's attention by assessing an amount of punitive damages that will hopefully bring about an alteration of their pipelaying vessels to save those other workers who, like the plaintiff, may be still exposed to hazard." (See Appendix A).

The evidence at trial established that the State of Louisiana, Department of Environmental Quality, inspected Brown & Root pipelaying barges on three occasions to determine the existence of radiation hazards to workers on these barges. The inspections were made in 1967, 1969 and 1976 and revealed that

certain Brown & Root workers were exposed to excessive radiation from x-raying activities aboard these barges and were subjected to levels of radiation exposure grossly in excess of the maximum quarterly allowable dosage established by federal and state regulatory agencies. The 1969 report concluded that personnel in the bunk room adjacent to the x-ray station were exposed to as much as 89,000 millirems per week, 10,000 times the permissible level under state and federal regulations. Brown & Root management was notified each time of the findings and warned of the hazards to its workers. Nevertheless, Brown & Root chose to ignore the warnings and failed to take the measures recommended by the State to remove the hazards.

In the opinion of the trial court, which weighed the evidence before it:

> The court is shocked and incensed by the conduct of Brown and Root, Inc., in this case. Its management, assuming lay ignorance, was specifically warned of the hazards to its workers over a ten year period and chose to intentionally ignore those warnings.... This court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees...
>
> Ten years of warnings, which if heeded, could have saved this young man, were intentionally ignored by defendants herein. (See Appendix A).

The Louisiana Fourth Circuit Court of Appeal upheld the trial court's finding that Brown & Root was guilty of willful and wanton misconduct regarding the safety of Stephen A. Mistich

and affirmed the award of punitive damages. The Supreme Court of Louisiana clearly indicated its position on such an award when it denied Brown & Root's application for a writ of certiorari on March 12, 1993.

SUMMARY OF ARGUMENT

The availability of punitive damages under the general maritime law is not an unresolved issue, but rather, a well-established principle in law dating back almost two centuries. This Court first recognized a cause of action under the general maritime law to recover punitive damages due to the intentional, willful and wanton misconduct of a party in ***THE AMIABLE NANCY***, 16 U.S. (3 Wheat) 546 (1818). Maritime courts have continued to recognize such damages when the misconduct of a party is of an egregious nature.

Although punitive damages are viable under the general maritime law for willful and wanton behavior, petitioner requests this Honorable Court to review this case due to an alleged conflict which exists among the federal circuit courts as to the availability of punitive damages under a general maritime claim of unseaworthiness. General maritime law claims for punitive damages due to willful and wanton misconduct are, however, different from general maritime law and Jones Act claims for damages due to unseaworthiness and negligence.

Respondents respectfully observe that the award for punitive damages in this case is based not on unseaworthiness, but on a general maritime law claim for willful and wanton misconduct, a cause of action, which has been consistently recognized since as far back as ***THE AMIABLE NANCY.*** Consequently, there is no conflict as alleged by petitioner. The

right of respondents to recover the damages awarded herein on the basis of Brown & Root's egregious conduct is separate and distinct from rights later created under the Jones Act. Respondents respectfully submit that review by this Honorable Court is unnecessary.

ARGUMENT

As early as 1818, this Court awarded punitive damages under general maritime law due to intentional, willful and wanton misconduct. ***THE AMIABLE NANCY***, 16 U.S. (3 Wheat) 546 (1818); ***Gallagher v. THE YANKEE***, 9 F. Cas. 1091 (N.D. Cal. 1859). This trend of awarding such damages under the general maritime based upon willful and wanton conduct has continued in the federal courts. ***United States Steel Corp. v. Fuhrman***, 407 F.2d 1143 (6th Cir. 1969); ***In re Marine Sulphur Queen***, 460 F.2d 89 (2nd Cir. 1972); ***In re Merry Shipping, Inc.***, 650 F.2d 622 (5th Cir. 1981); ***Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.***, 767 F.2d 1379 (9th Cir. 1985); ***Muratore v. M/S SCOTIA PRINCE***, 845 F.2d 347 (1st Cir. 1988); ***In re P & E Boat Rentals, Inc.***, 872 F.2d 642 (5th Cir. 1989).

The well-recognized standard for imposing punitive damages was, and still is, set forth in ***In re Merry Shipping, Inc.***, 650 F.2d 622 (5th Cir. 1981). Petitioner interprets the case of ***Miles v. Apex Marine Corp.***, 498 U.S. 19 (1990) as overruling this longstanding precedent recognizing a cause of action under the general maritime law to recover damages for the intentional, willful and/or wanton misconduct of a party.

The lower court cases cited by Petitioner which adopt its interpretation of ***Miles*** are clearly inapposite to the present case. The ***Miles*** holding is limited and cannot be extended to eliminate

such a longstanding cause of action as the recovery of punitive damages. In fact, respondents trust that had this Court in ***Miles*** intended to override precedent dating back almost 200 years, it would have expressly done so. This is abundantly apparent since punitive damages were addressed and recognized in the lower courts in the ***Miles*** case. The issue upon which this application for writs is based is whether a cause of action exists under the general maritime law for Mistich to recover punitive damages due to the intentional, willful and wanton misconduct of Brown & Root. This Court did not address this issue in ***Miles***.

This Honorable Court in ***Miles*** expressly stated that it was granting *certiorari* on only two issues:

1. Whether a parent of a deceased seaman can recover for loss of society under general maritime law due to the unseaworthiness of a vessel; and

2. Whether the estate of a deceased seaman can recover for the future lost earnings of a seaman under general maritime law due to the unseaworthiness of a vessel.

Thus, the ***Miles*** case questioned only the type of compensatory damages recoverable due to the unseaworthiness of a vessel under the general maritime law. The ***Miles*** holding is limited in this respect.

The court in ***Hannon v. Waterman Steamship Corp.***, 1991 WL 88012 (E.D. La. May 22, 1991), properly recognized the limitations of the ***Miles*** holding. The court stated:

> The Court's decision [in ***Miles***] was limited to excluding recovery of these two elements of compensatory damages and did not address the right of the seaman's

> survivor to recover punitive damages which are noncompensatory in nature.

Id. at 1.

The court in ***Hannon*** further recognized that the "***Miles*** decision does not provide a basis for overruling longstanding precedent recognizing the right to assert a claim for punitive damages under the general maritime law." ***Id.***

In addition to the ***Hannon*** case, the United States District Court for the Eastern District of Louisiana in the case of ***Duplantis v. Texaco***, 771 F. Supp. 787 (E.D. La. 1991) also acknowledged that a cause of action exists to recover punitive damages under the general maritime law. The court in ***Duplantis*** determined that ***Miles*** did not eliminate a seaman's cause of action for punitive damages.

The ***Duplantis*** case held that ***Miles*** and other cases extending the ***Miles*** holding to eliminate a cause of action for punitive damages, are "obviously inapposite." Also, the ***Duplantis*** court observed that the Jones Act did not intend to disturb seamen's general maritime law claims which pre-existed the enactment of the Jones Act in 1920, including claims for maintenance and cure and punitive damages. The Jones Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." ***THE ARIZONA v. Anelich***, 298 U.S. 110 (1936).

It is important to note that the court recognized and understood that a cause of action exists for recovery of punitive damages due to willful and wanton conduct under the general maritime law, separate and apart from any action based on unseaworthiness.

The ***Duplantis*** court stated:

> The basic premise of ***[Miles v.] Apex Marine***, *supra*, was rather uniformity and the intended role of the Jones Act in effecting that constitutionally required uniformity in that exercise of admiralty jurisdiction. Tacking back to the point in time where the Jones Act became law, the general maritime law provided no recovery for what ailed the injured seaman's spouse. Accordingly, there being no recognition of spousal recovery for loss of consortium, the Court concluded ipso facto, neither did the Jones Act.
>
> Whether characterized as pecuniary or nonpecuniary damages, as early as ***The Amiable Nancy***, *supra*, **the general maritime law contemplated punitive damages for gross and wanton conduct in an action under the general maritime law not based on unseaworthiness**
>
> . . . .
>
> The case at bar involves plaintiff's claim under the general maritime law for injuries resulting not from unseaworthiness, but rather on account of defendant Texaco's alleged willful and wanton failure to remove debris from plugging and abandoning operations and to mark the areas where such plugging and abandoning occurred. Plaintiff's suit is not a suit under the Jones Act, rather it comes under the general maritime law and includes allegations to the effect that Texaco willfully violated its duty owed as a mineral leaseholder.
>
> In other words, this court is of the opinion that ***[Miles v.] Apex Marine***, ***Donaghey***, and ***MARDOC***,

> *supra*, cited in Texaco's brief for the proposition that recovery under the general maritime law are limited to pecuniary damages only, are thus obviously inapposite.

Id. at 788-89 (Emphasis added).

In a recent decision, ***CEH, Inc. v. F/V SEAFARER***, 1993 WL 156902 (D.R.I. May 13, 1993), the federal district court in Rhode Island followed the reasoning in ***Duplantis***. The court stated:

> In ***Duplantis***, a claim for punitive damages was filed under the general maritime law for injuries not based on unseaworthiness but on defendant's alleged willful and wanton conduct and, therefore, the district court found ***Miles*** "inapposite" and allowed the claim. ***Id.*** at 789. The same situation exists here. The claim by plaintiffs is pursuant to general maritime law and not pursuant to any statute or unseaworthiness claim. Consequently I find ***Miles*** not controlling here as it deals with recovery of damages under the Jones Act and DOSHA and the need to compel uniformity in general maritime law with these statutory remedies. I do not read ***Miles*** to mean that there can be no recovery of punitive damages in any claim under general maritime law. Since general maritime law has recognized claims for punitive damage for well over a century and there has been no total bar to these claims under general maritime law, then claims for punitive damages remain viable under general maritime law except as specifically held otherwise by ***Miles***. Recovery of punitive damages in the type of claim presented by

these plaintiffs has not been prohibited.

. . . .

Since punitive damages have been contemplated in general maritime law since 1818 and I have not been cited to nor have I found in my research any decision specifically prohibiting a claim for punitive damages under the circumstances presented by this case, I hold that plaintiffs have a claim under general maritime law for punitive damages based upon allegations of willful, reckless and malicious misconduct of the individual defendants. Of course, plaintiffs still must prove their claim for punitive damages at trial, but that is left to another day.

Id. at 4-5.

Petitioner's interpretation of the ***Miles*** holding, in essence, nullifies the entire body of general maritime law. This was not the intention of Congress when it enacted the Jones Act, nor, respondents assume, was it the intention of this Court when rendering the ***Miles*** decision. In fact, this Court in ***Miles*** recognized that:

> The Jones Act provides an action in negligence for the death or injury of a seaman.... The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims . . .[1]

Id. at 324.

[1] Otherwise, an argument could be made that the Jones Act remedy was a substitute for traditional maintenance and cure. Such an argument would have received the same short shrift that should be given petitioner's argument here.

Petitioner's argument that ***Miles*** puts in dispute whether punitive damages are recoverable any longer under the general maritime law is unfounded. Even petitioner was forced to admit that "[t]he Court of Appeal is, of course, quite correct that ***Miles*** involved damages for loss of society, not punitive damages. Thus, like the Court below, we recognize that the present case is not controlled a fortiori by ***Miles.***" Petition for Writ of Certiorari at 16. Thus, as petitioner readily admits, the case at bar is simply not a case that is covered under ***Miles***. Petitioner's attempt to use ***Miles*** to abrogate over two centuries of this Honorable Court s jurisprudence is untenable.

In re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981), affirmed the availability of punitive damages under the general maritime law. The court reasoned that "punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." ***Id***. at 625.

It is important to note that in the process of granting punitive damages, the Fifth Circuit cited to the case of ***Gore v. Turner***, 563 F.2d 159 (5th Cir. 1977), which delved into the behavior required to invoke such special damages. "The award of punitive damages involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent to future illegal conduct." ***Id.*** at 164. Moreover, the Fifth Circuit in ***Merry Shipping*** remanded the case in order to allow the lower court to decide whether the facts were sufficient to submit to a jury the claim of punitive damages. ***Merry Shipping,*** 650 F.2d at 627. Therefore, it was the behavior of the defendant that guided the Fifth Circuit's award of punitive damages.

Petitioner's representation that the granting of certiorari in the case at bar "would almost certainly resolve th[e] conflict" over whether punitive damages are available under the general maritime law in maintenance and cure cases is misleading. In fact, in the proceedings below, the failure to pay maintenance and cure was never at issue. Consequently, the case at bar does not present an actual "case or controversy" on this issue within the meaning of Article III of the United States Constitution. It is well-established that it is not the business of this Court to grant advisory opinions. ***Mistretta v. United States***, 488 U.S. 361, 385 (1989).

Although the case herein has never involved the issue of failure to pay maintenance and cure, the longstanding acceptance as to the availability of punitive damages based upon willful and wanton behavior is reflected in this area of the general maritime law. Federal courts are united regarding the availability of punitive damages based upon an employer's willful and wanton failure to pay maintenance and cure. ***Olsen v. THE SCOTLAND***, 42 F. 925 (S.D.N.Y. 1890); ***Robinson v. Pocahontas, Inc.***, Inc., 477 F.2d 1048 (1st Cir. 1973); ***Gaspard v. Taylor Diving & Salvage Co., Inc.***, 649 F.2d 372 (5th Cir. 1981); ***Holmes v. J. Ray McDermott & Co.***, 734 F.2d 1110 (5th Cir. 1984); ***Harper v. Zapata Offshore Co.***, 741 F.2d 87 (5th Cir. 1984); ***Yelverton v. Mobile Laboratories, Inc.***, 782 F.2d 555 (5th Cir. 1986); ***Morales v. Garijack, Inc.***, 829 F.2d 1355 (5th Cir. 1987); ***Hines v. J. A. Laporte, Inc.***, 820 F.2d 1187 (11th Cir. 1987); ***Ridenour v. Holland Am. Line Westours, Inc.***, 806 F. Supp. 910 (W.D. Wash. 1992).

Petitioner's attempt to create a conflict on this issue by citing to the Second Circuit opinion in ***Kraljic v. Berman Enters., Inc.***, 575 F.2d 412 (2nd Cir. 1978) is untenable. The court in ***Kraljic*** did not state that punitive damages were unavail-

able, but held that punitive damages in some cases may be limited to counsel fees based upon the facts of that case. The court indicated however, that additional punitives may be available if the employer's failure to pay maintenance and cure aggravates a seaman's condition. ***Id.*** at 415.

It is undeniable that punitive damages for willful failure to pay maintenance and cure, as in other cases of willful and wanton misconduct under the general maritime law, are traditionally accepted and recoverable. There is no conflict between any of the circuit courts regarding this issue.

Petitioner attempts to create an additional conflict between the present case, a case based upon willful and wanton behavior, and the case of ***Miller v. American President Lines, Ltd.***, 1993 WL 78689 (6th Cir. Mar. 23, 1993), a case which dealt with the issue of whether punitive damages were recoverable in an unseaworthiness action for the wrongful death of a seaman. ***Miller***, unlike the instant case, did not involve the issue of whether an employer's behavior was willful and wanton in disregarding the safety of its workers. ***Miller*** solely focused upon the condition of the vessel and not upon the employer's egregious behavior. Therefore, ***Miller*** has no applicability to the instant case, where a punitive damage award was based upon Brown & Root's willful and wanton systematic behavior in totally disregarding the safety of its workers for over ten years, despite repeated warnings from state authorities. This was no simple question of an isolated condition of unseaworthiness on a single vessel. This was a question of a long-standing, upper level corporate affirmative decision to totally and wilfully ignore safety.

Whether this Court would uphold ***Miller*** in determining that punitive damages are not available under the general mari-

time law for unseaworthiness after ***Miles***, is not the issue now before the Court. Although respondents contest the contention that punitive damages are no longer viable post-***Miles*** in an unseaworthiness action, it is only the issue of whether punitive damages can be awarded under the general maritime law for the egregious generalized corporate misconduct of Brown & Root which is presented in the case at bar. In light of the longstanding precedent recognizing punitive damages under such circumstances, respondents submit that there is no authority to question such an award.

Petitioner's writ further infers that this Court should grant review to consider the economic impact punitive damages may have on the maritime industry. However, petitioner clearly misplaces the focal point where the economic impact is truly felt. Priority should be placed on the economic effect a maritime defendant's willful misconduct has on the work place in terms of human lives. The consequences of an unsafe work environment is extremely costly in terms of medical expenses, physical pain and suffering, and disability, all of which take a tremendous toll on the work force. Justice dictates that a maritime defendant who is aware of a dangerous situation and who ignores it should be the party to bear the economic burden when an innocent person is injured or killed as a result of the danger. Punitive damages serve to deter such willful misconduct and promote the undertaking of remedial measures.

Maritime courts, concerned with public policy, created punitive damages under the general maritime law in order to punish companies such as Brown & Root for their willful and wanton behavior. Punitive damages are wholly a product of judicial decision-making, fashioned on the basis of tradition and policy long pre-dating the Jones Act. ***In re Merry Shipping, Inc.***, 650 F.2d 622 (1981); See e.g. ***United States v. Reliable***

Transfer Co., 421 U.S. 397 (1975). The award of these damages is the only mechanism available to compel companies like Brown & Root to make necessary and life-saving changes, which would otherwise be ignored.

Furthermore, it is a fallacy to suggest that the maritime industry as a whole will be adversely affected because of the few fact specific cases which warrant an award of punitive damages. These special damages have been awarded for centuries and the maritime industry has continued to survive and prosper. These damages are invoked only when the facts of a particular case reflect the egregious conduct that demands this special award. Brown & Root exhibited just such conduct in this case when it chose for over ten years to ignore warnings about the excessive radiation exposure workers like Stephen A. Mistich were being forced to endure.

Considering the intentional and egregious behavior exhibited by Brown & Root, the four million dollar punitive damage award was in no way excessive or unreasonable. The trial judge's award was directly in line with the compensatory damages of $3,147,608.00 (reduced to $2,874,478.00 by the appellate court). Moreover, the punitive damages were awarded by an experienced judge who was "shocked and incensed by the conduct of Brown & Root, Inc." His dismay was properly affirmed throughout the state appellate review. This was not a runaway jury verdict.

CONCLUSION

Nowhere in petitioner's writ does petitioner argue that punitive damages are no longer viable under the general maritime law for willful and wanton behavior. Such an argument would be illusory against the great weight and history of cases which have granted such damages based upon egregious behavior.

The recovery of punitive damages under the general maritime law for willful and wanton behavior remains viable. Clearly, there is no conflict in the jurisprudence that these damages are awarded under the general maritime law for willful and wanton behavior when particular fact situations dictate their necessity. Punitive damages were warranted in the instant case due to the willful and wanton conduct of Brown & Root in (1) intentionally failing to follow the recommendations of the state authorities for over ten years, (2) in knowing that its failure to follow state and federal regulations created a hazard to crew members such as Stephen A. Mistich, and (3) in thereby intentionally, willfully and wantonly disregarding the safety of Stephen A. Mistich.

In the instant case, the trial judge and the Louisiana Fourth Circuit Court of Appeal found that the facts compelled an award of punitive damages. As stated by the trial court, "[t]his Court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees. No case could better fit the punitive damage prerequisite of the United States Fifth Circuit Court of Appeals in ***In re Merry Shipping Co.***, 650 F.2d 622 (1981) than the instant case." (See Appendix A). Punitive damages were expressly created and continue to exist under the general maritime law for cases such as the case of Stephen A. Mistich.

There is no dispute among the federal circuit courts that punitive damages are viable under the general maritime law for willful and wanton behavior, and because the particular facts of the instant case leave no doubt that the award of punitive damages was proper here, respondents respectfully request that this Court deny petitioner's application for writ of certiorari.

Respectfully submitted,

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APPENDIX A

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA
DIVISION "B"

No. 29-703

STEPHEN A. MISTICH

versus

PIPELINES, INCORPORATED, et al

Filed: May 25, 1989

/s/ Jeanine H. Kuhlman
Deputy Clerk

REASONS FOR JUDGMENT

The Court rendered Judgment in the above entitled and numbered cause on the 28th day of April, 1989, assessing compensatory and punitive damages against defendant, Brown and Root, Inc., in the total sum of $7,147,608.00.

Stephen A. Mistich, presently 35 years of age and a father of three legally adopted children, worked as a seaman/welder aboard various pipelaying barges owned by Brown and Root, Inc., Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Services, Inc., and Santa Fe International, Inc., over the period June 11, 1976-November 18, 1985.

On all the barges on which plaintiff worked over the aforesaid period, each weld would be x-rayed either by an internal, or external, x-ray machine. The evidence preponderates that external x-ray machines were predominantly used on the vessels on which plaintiff worked over the period in question, and further preponderates that the radiation source was typically 100 curies of Iridium-192. Each weld would be x-rayed following the finishing weld in the "capping" station. The external machine would make three shots of each weld of approximately thirty seconds duration. Each shot would cover a 120 degree section of the weld. The first weld would be shot from the top of the pipe downward; the second shot would be from the outboard side of the pipe inboard; and the third shot would be from the inboard side of the pipe outboard. The internal x-ray machine, which was infrequently used on the barges on which plaintiff worked, would shoot one 360 degree shot of the weld from the inside of the pipe in all directions. The plaintiff, William Reinhardt, "Buddy" Pruett, and Mitchell Tidwell testified that the barges would average eighty welds per day and that a majority of the x-rays would be shot in the "capping" station, as opposed to the designated x-ray station, with the capping welders six to eight feet away and unprotected. This testimony is basically uncontradicted. Defendant produced no evidence or testimony to refute plaintiff, Pruett, or Tidwell. The record contains a great deal of testimony by Brown and Root witnesses as to the policy and guidelines to be employed and implemented by the x-ray technicians but not any testimony as to whether these were actually carried out or enforced in connection with the day to day operation. The evidence establishes that this process of "moving up" to x-ray the welds was dictated and directed by Brown and Root, Inc., and was carried out in order to maintain a high level of production.

The crew quarters and crew facilities on which plaintiff worked were either directly below the "pipe alley", or immediately adjacent to the "pipe alley", the "pipe alley" being a trough on the port side of the vessel where the pipe moved along on rollers to receive its various services, including x-ray. The welders, like plaintiff, customarily slept in the quarters beneath their working stations, the theory being that a worker's replacement on an opposite shift would follow the "golden rule".

On pipelaying barges, the welders would tend to work in stations wherein the job performed most fitted their individual skill. Although the welders rotated from station to station on some barges, the evidence preponderates that the plaintiff herein most often worked in the capping station, which was the station closest to the x-ray station. Accordingly, he frequently slept in the quarters beneath, or adjacent to the x-ray station.

The evidence unequivocally established that the State of Louisiana, Department of Environmental Quality, Office of Air Quality and Nuclear Energy, on three occasions inspected pipelaying barges owned by Brown & Root, Inc., and McDermott, Inc., for the specific purpose of determining if there was a radiation hazard to the workers on the barges from the x-ray activities. The inspections were made in 1967, 1969, and 1976. Each report was sent to Brown & Root, Inc. management. The 1967 report was sent to Mr. Walter Gard, Manager of the Pipeline Department; the 1969 report was sent to Mr. George Batcheller, Jr., Safety Engineer; and the 1976 report was sent to Mr. Claude Adams, Safety Supervisor, and Mr. W. C. Jones, Terminal Manager. The 1967 report put Brown and Root, Inc., on notice that the workers in stations adjacent to the x-ray station were subject to radiation exposure in excess of the maximum quarterly allowable dosage, established by the United States Nuclear Regulatory Commission, 10 CFR ch. 1, Part 20, and adopted by Louisiana through the Department of Environmental Quality,

Office of Nuclear Energy, as an agreement state, Title 33 of the Louisiana Radiation Regulations, Part 15, Ch. 4, page 95, et seq. The report specifically cautioned Brown and Root, Inc., that personnel monitoring be provided in order to adequately determine the radiation exposure of the workers in the area adjacent to the x-ray station, or alternatively, that fixed shielding be provided to intercept the scattered radiation from the x-ray activities. The evidence clearly establishes that Brown & Root, Inc., did not furnish the workers with the monitoring suggested and did not install the fixed shielding to intercept the scattered radiation. Finally, the report cautioned that persons in the living quarters might be exposed to excessive radiation if radioactive materials, such as Iridium-192, were used. Pruett testified that on one occasion a monitoring device was to be installed in the crew quarters, which was done but no results were revealed to any welder and no official report was made and if made was not presented at trial.

The 1969 report, based on work load calculations provided by Brown & Root, Inc., concluded that personnel in the bunk room adjacent to the x-ray station would be exposed to 89,000 mR per week, which would be 10,000 times the permissible level of 10mR per week maximum under the aforesaid applicable regulations. The report went on to recommend the installation of 2.5 inches of lead shielding, seven feet aft and seven feet forward of the x-ray station on the pipe alley deck; on the pipe alley bulkhead between the pipe alley and the bunk area; and three feet back from the pipe alley bulkhead on the main deck above the bunk area. The intention of the foregoing being to totally insulate the crew in the bunk, and living areas, below the x-ray station from radiation. The report went on to recommend 1.6 inches of lead or 11 inches of concrete seven feet high running the fourteen foot length of the x-ray area to protect personnel on deck from radiation. None of the foregoing were done by Brown and Root, Inc. The 1976 report confirms Brown and Root, Inc.'s

non-compliance with the 1967 and 1969 reports because it established the presence of only .25 inches of lead on a portion of the bulk head between the pipe alley and the bunk space. It discloses no lead on the deck of the pipe alley, no lead on the top of the bunk area, inadequate lead between the bunk area and the pipe alley, and no lead shield to protect the personnel on deck. The 1976 report went on to establish the potential of excessive allowable radiation exposure and recommended the installation of a 2-1/2 inch lead, or fourteen inch concrete, enclosure above, inboard and below the x-ray station to protect personnel on deck and personnel in the bunk area, or living quarters. Every witness, including Brown and Root's witnesses, testified that the 1976 recommendations of the Louisiana Division of Radiation Control were never complied with by Brown and Root, Inc. All of the foregoing inspections and recommendations occurred prior to the time that plaintiff went aboard a Brown and Root, Inc. pipelaying barge in 1976.

Every adult lay person in this country knows that radiation is an ultra-hazardous activity and that those persons working with, or around, it on a daily basis must insulate themselves therefrom with lead lining. The court is shocked and incensed by the conduct of Brown and Root, Inc., in this case. Its management, assuming lay ignorance, was specifically warned of the hazards to its workers over a ten year period and chose to intentionally ignore those warnings. In addition to the foregoing, a Brown and Root barge captain, Mr. "Buddy" Pruett testified that he requested lead from the Safety Department over a two-year period and was ultimately furnished with only .25 inch lead sheeting to insulate a portion of the bulk area on his barge. This Court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees. No case could better fit the punitive damage prerequisite of the United States Fifth

Circuit Court of Appeals in ***In re: Merry Shipping Co.***, 650 F.2d 622 (1981) than the instant case.

All of the physicians that testified in this case concurred in plaintiff's diagnosis of chronic myelogenous leukemia. Additionally, every medical witness that testified concurred that exposure to excessive levels of radiation is an accepted cause of leukemia, and chronic myelogenous leukemia specifically. The foregoing accepted causal relationship originally grew out of the experience of radiologists thirty or forty years ago prior to the recognition of the necessity for lead shielding, and was confirmed by the unfortunate aftermath of Nagasaki and Hiroshima. In all of the foregoing unfortunate populations, grossly excessive levels of leukemia, including chronic myelogenous leukemia, were detected following radiation exposure. Dr. David Margileth and Dr. Lee Roy Morgan both testified that plaintiff's chronic myelogenous leukemia was, in their opinion, legally caused by his exposure to excessive levels of radiation. The court was impressed with the expertise, demeanor, candor, and honesty of these two dedicated physicians. Dr. Marcus Black and Dr. Carl Kardinal testified that they could not say that radiation exposure did, or did not, cause plaintiff's chronic myelogenous leukemia, although both admitted that they accepted the fact that radiation does cause plaintiff's type leukemia. Their vanilla testimony was of no help to the Court because neither was willing to render an opinion one way, or the other. Since an expert can only express an opinion, an expert that is unwilling to express an opinion adds nothing to the decision making process. The testimony of Dr. William Stein, who saw the plaintiff on one occasion, is totally disregarded by the Court. Dr. Stein's adversarial demeanor and willingness to make unsupported and unwarranted conclusions, leads this court to conclude, as a matter of fact, that his testimony is unworthy of belief. The court further noted that Dr. Stein relied only on treatises and writings

of other medical doctors, however the testimony of all other Doctors testifying was very positive, that no case histories, by the very nature of the disease, had ever been conducted by the medical profession, therefore the court concluded that the testimony of Dr. Stein is based solely on theories expounded by the persons he quoted and on which he based his opinion on.

The standards for protection against radiation passed by the United States Nuclear Regulatory Commission, and the standards for protection against radiation passed by the Louisiana Office of Nuclear Energy, aforecited, were specifically passed for the purpose of protecting the American and Louisiana worker from the hazard, among others, of cancer and leukemia associated with excessive radiation exposure. Those regulatory bodies recognized that exposure to greater than 0.5 rem in any one calendar year places the exposed person at risk of cancer or leukemia.

Mr. Ronald Wascom, an employee of the Louisiana Division of Radiation Control, and the author of the 1976 report, testified that the plaintiff herein was exposed throughout his employment, to levels of radiation greatly in excess of the maximum annual allowable, and the court as a matter of fact, concludes that to be the case based on all of the evidence brought out at the trial including, but not limited to, the testimony of Mr. Wascom.

The Court finds, as a matter of fact, that the plaintiff's chronic myelogenous leukemia was directly caused by his exposure to excessive levels of radiation.

The Court as a matter of fact, also finds that the vessels on which plaintiff worked for Brown and Root, Inc., were unseaworthy, and that Brown and Root, Inc., was negligent.

The Court concludes that the aforesaid unseaworthiness was the cause, and the aforesaid negligence a proximate cause, of plaintiff's contraction of leukemia, each theory of liability contributing equally to plaintiff's injuries and damages.

Plaintiff, as a matter of fact, was also exposed to excessive levels of radiation while working on barges owned by Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Service, Inc., and Santa Fe International, Inc., with whom the plaintiff settled 21 days prior to trial for the sum of $250,000.00. The settlement with these defendants is reflected in a stipulation filed in the record of the case prior to commencement of the trial against Brown and Root, Inc. The Court accepted plaintiff's testimony that the conditions were basically no different on the barges owned by the settling defendant than those heretofore described on the barges operated by Brown and Root, Inc. The only factual difference between the posture of the settling defendants is the absence of any prior inspection or warning, by any regulatory agency, and the fact that plaintiff's employment with the settling defendants, with the exception of Santa Fe International, Inc., preceded plaintiff's diagnosis of chronic myelogenous leukemia on January 19, 1986, by less than four years.

The Court considered the possible liability of the settling defendants for the purpose of apportioning fault as required under General Maritime Law.

The testimony of all of the physicians that testified in this case, and the Nagasaki and Hiroshima experiences, establishes, beyond a doubt, that there is a definite latency period between radiation exposure and the advent of symptoms of cancer, or leukemia, induced by radiation.

The Court finds as a matter of fact, that the applicable latency period is not less than three years, but more reasonably in excess of four years. Accordingly, plaintiff's employment with all of the settling defendants, with the possible exception of Santa Fe International, Inc., were subsequent to the latency period and, accordingly, had no causal relationship with plaintiff's contraction of chronic myelogenous leukemia. The Court further finds that plaintiff, during his employment with Santa Fe International, Inc., could have been exposed to radiation from x-ray for a maximum of seven days and concludes that such exposure, if within the latency period, is de minimis when compared with the length of exposure, (approximately 1,073 days), with Brown and Root, Inc. Therefore, the Court has concluded that plaintiff's exposure during his employment with Brown and Root, Inc., contributed 100% to his contraction of chronic myelogenous leukemia, whereas his employment with the settling defendants contributed 0%.

Turning now to the Court's evaluation of compensatory damages due by Brown and Root, Inc. to plaintiff, predicated upon the Court's heretofore determination of negligence and unseaworthiness, the Court, as a preamble, is constrained to cite the Louisiana First Circuit Court of Appeal decision in ***Wisner v. Illinois Central Gulf Railroad, et al***, 537 S.2d 740 (1988), wherein the Court affirmed, with moderate modifications, a $2,794,000.00 jury verdict in favor of a 35 year old Louisiana State Trooper. In the ***Wisner*** case, the plaintiff claimed damages for lung impairment and fear of cancer as a consequence of exposure to unconfirmed levels of toxic chemicals. In the instant case, the plaintiff has confirmed chronic myelogenous leukemia secondary to established levels of radiation grossly in excess of the maximum annual allowed exposure.

The Court was impressed by the testimony of Dr. Melville Wolfson, the plaintiff's economist, and the reasonableness of the acceptable criteria utilized by him in reaching his calculations. The Court on the other hand, found the testimony of defendant's economist, Dr. Dan Cliffe, to be devoid of acceptable criteria to impress this Court with the accuracy of his calculations. For instance, his utilization of present day earning factors and inflationary factors spanning seventy-five years preceding trial, do not measure up to a standard of objectivity. The Court finds as a matter of fact, that plaintiff sustained past lost wages in the sum of $83,912.00 and future lost wages in the sum of $804,397.00 both testified to by Dr. Melville Wolfson.

Dr. Margileth, and Dr. Carl Kardinal, testified that a bone marrow transplant, alone, one of the reasonably anticipated procedures that plaintiff will have to undergo, would cost between $100,000.00 and $1,000,000.00 depending on the rejection factor ever present in such a procedure. Plaintiff was hospitalized in a blast state one month preceding trial at a cost in excess of $50,000.00 and according to Dr. Margileth, is certain to be hospitalized for additional chemotherapy and radiation treatment prior to institution of a bone marrow transplant procedure. Therefore, the Court feels that an award for future medical expenses of $186,000.00 is conservative considering the foregoing testimony.

The parties stipulated to plaintiff's past medical bills totaling $73,298.78, reserving defendant's objection to the causality. The Court finds that the stipulated bills were in fact causally related to plaintiff's exposure to radiation and contraction of chronic myelogenous leukemia, and, accordingly, finds that amount due by defendant.

The Court can think of no set of circumstances that could possibly produce greater physical pain, mental anguish, fear of death, loss of ability to enjoy life, and loss of ability to pursue happiness than the set of circumstances that confronted and continued to confront the plaintiff in this case. The Court was moved by the sincerity, intelligence, desire for life, and determination to survive exhibited by this young man during the course of this trial.

The Court feels that an award of $800,000.00 for pain and suffering and $1,200,000.00 for mental anguish, both encompassing the other elements heretofore addressed, to be fair compensation for those elements of damage.

Ten years of warnings, which if heeded, could have saved this young man, were intentionally ignored by defendant herein. The State of Louisiana could not get the defendant's attention by direct notification to defendant's management personnel. It is incumbent upon this Court, therefore, to attempt to get the defendant's attention by assessing an amount of punitive damages that will hopefully bring about an alteration of their pipelaying vessels to save those other workers who, like the plaintiff, may be still exposed to hazard. The Court awards to the Plaintiff the sum of $4,000,000.00 in punitive damages for the foregoing reasons.

The Court, under the discretion vested in it, awards interest, at the legal rate provided under Louisiana Law, on one-half of the foregoing compensatory damage award attributable to the unseaworthiness responsibility of defendant from date of judicial demand and legal interest at the rate provided under

Louisiana Law, on the remainder of the judgment, compensatory and punitive, from date of judgment until paid.

The Court further casts defendant for all costs of these proceedings.

/s/ Emile E. Martin, III
Emile E. Martin, III
Judge

May 25th, 1989.